CHOOI MUN SOU & ORS.

v.

NG SENG KIOK & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM JC
[ORIGINATING SUMMONS NO: R1-24-69-1992]
5 APRIL 1997

CIVIL PROCEDURE: *Appeal - Leave to appeal - Appeal on a case stated under s. 22(3) of Arbitration Act 1952 - Application for leave to appeal to Court of Appeal - Whether to be made in High Court or Court of Appeal*

ARBITRATION: *Arbitration Act 1952 - Case stated - Section 22(1)(a) - Appeal under s. 22(3) - Leave to appeal, application for - Whether to be made in High Court or Court of Appeal - Courts of Judicature Act 1964, s. 68 - Whether relevant*

STATUTORY INTERPRETATION: *Canons of construction - Generalibus specialia derogant - Arbitration Act 1952, s. 22(3) - Courts of Judicature Act 1964, s. 68 - Whether contradictory - Whether generalibus specialia derogant applies in favour of s. 22(3) in respect of an appeal on a case stated under Arbitration Act 1952*

This was an application by the plaintiffs, pursuant to s. 22(3) of the Arbitration Act 1952 ('AA52'), for leave from the instant Court to appeal to the Court of Appeal against an earlier decision of the High Court. At the hearing of the application, the defendants raised the preliminary objection that the application for leave to appeal ought to have been made to the Court of Appeal and not to the instant Court. The defendants submitted that: (i) the phrase "or a Judge of the High Court" in s. 68 of the Courts of Judicature Act 1964 ('CJA64') had been removed by the Courts of Judicature (Amendment) Act 1994 ('CJAA94') and, therefore, all applications for leave to appeal must be made to the Court of Appeal; and (ii) the provisions of s. 22(3) of the AA52 in respect of leave from the High Court are inconsistent with both the creation of the Court of Appeal and with s. 68 of the CJA64 as amended by the CJAA94 and, therefore, are impliedly amended by the CJAA94.

Conversely, the plaintiffs submitted that a decision of the High Court under s. 22(3) of the AA52 is deemed to be the judgment of the High Court within the meaning of s. 67 of the CJA64, and no appeal from the decision of the High Court on any case stated under s. 22(1)(a) of the AA52 may be made without the leave of the High Court or of the Supreme Court.

Thus, the principal issue before the instant Court was whether an application for leave to appeal on a case stated must be made to the High Court or to the Court of Appeal.

Held:

[1] The second limb of s. 22(3) of the AA52 stipulates a condition on an appeal on a case stated, ie, that leave must first be obtained either from the High Court or the Supreme Court. This condition is **not** inconsistent with s. 67 of the CJA64 as s. 67(1) expressly states that it is "subject nevertheless to this or **any other written law** regulating the terms and conditions upon which such appeals shall be brought." The "any other written law" in s. 67(1) of the CJA64 includes s. 22(3) of the AA52 which clearly sets out its own terms and conditions for bringing an appeal, ie, that leave must first be obtained from **either** the High Court or the Supreme Court.

[2] There is no amendment in force that deletes or provides for the substitution of the High Court in s. 22(3) of the AA52; consequently, the stipulation therein relating to "the leave of the High Court" remains in force and unaltered.

[3] The subject matter of the instant appeal is in respect of a case stated under s. 22(1)(a) of the AA52. Section 68 of the CJA64 is **not** relevant at all to an appeal on a case stated under the AA52.

[4] The provisions regulating the terms and conditions upon which an appeal on a case stated under the AA52 must be construed in the context of the AA52 and **not** in that of the CJA64. To this extent, the general provisions of the CJA64 must yield to the specific provisions of s. 22(3) of the AA52. Consequently, there is no conflict between s. 22(3) of the AA52 and s. 68 of the CJA64. *Generalibus specialia derogant* applies in this particular instance.

Per curiam:

[1] It is significant to note that there has been no amendment to date to substitute the "Supreme Court" appearing in the second limb of s. 22(3) of the AA52 with the "Court of Appeal". To avoid confusion, an amendment should be made accordingly.

[Defendants' preliminary objection overruled; plaintiffs' application for leave to appeal held to be properly made.]

Cases referred to:

TZ Engineering Sdn. Bhd. v. Metroplex Construction Co. Bhd. (KL High Court No: R2-24-296) ***(not foll)***

Public Prosecutor v. Chew Siew Luan [1982] 2 MLJ 119 ***(cit)***

Chan Tai & Anor. v. Official Assignee, F.M. [1957] 23 MLJ 54 ***(cit)***

Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor. [1995] 3 CLJ 520 ***(cit)***

Commissioner of Income Tax v. Shahzada Nand & Sons AIR [1966] SC 1342 ***(cit)***

Legislation referred to:

Arbitration Act 1952, ss. 22(1)(a), (3), 67

Constituion (Amendment) Act 1994, s. 46

Court of the Judicature Act 1964, s. 68

For the plaintiffs - Christopher Leong; M/s. Chooi & Co.

For the defendats - R.R. Sethu & Joseph Yeo; M/s. R.R. Sethu

JUDGMENT

Nik Hashim JC:

This is an application by the plaintiffs pursuant to s. 22(3) of the Arbitration Act 1952 (the AA) for leave from this Court to appeal against the decision of Yang Arif Dato' Abdul Kadir Musa J delivered on 29 November 1996. Pursuant to s. 22(1)(a) of the AA two questions of law arising in the course of the arbitration were referred by way of special case stated for the opinion of the learned Judge. The learned Judge answered the questions posed in the negative and dismissed the plaintiffs' originating summons. The plaintiffs are dissatisfied with the decision. Hence this application (Encl. 46).

At the hearing of the application for leave to appeal R.R. Sethu assisted by Joseph Yeo, for the defendants raised a preliminary objection by saying that the application for leave to appeal ought to be made to the Court of Appeal and not to the High Court. His objection appears to be founded on two grounds:

(i) that the amendments to s. 68 of the Courts of Judicature Act 1964 (CJA) by the Courts of Judicature (Amendment) Act 1994 (Act A886) on 24 June 1994 which removed the words "or a Judge of the High Court" in the section means that all applications for leave to appeal must in every case be made to the Court of Appeal only; and

(ii) the provisions of s. 22(3) of the AA in respect of leave from the High Court are inconsistent with the creation of the Court of Appeal and the amendments as stated in (i) above, and therefore, the contradictory provisions in s. 22(3) of the AA are impliedly amended by the Act A886.

Christopher Leong for the plaintiffs on the other hand, relied his argument on the very words of s. 22(3) of the AA which states:

A decision of the High Court under this section shall be deemed to be judgment of the High Court within the meaning of **s. 67 of the Courts of Judicature Act 1964** (which relates to the jurisdiction of the Supreme Court to hear and determine appeals from any judgment of the High Court), but no appeal shall be from the decision of the High Court on any case stated under sub-s. (1)(a) without the leave of the High Court or of the Supreme Court. (Emphasis added).

It is to be noted that since 24 June 1994 s. 67 was amended by Act A886 which provides for the Court of Appeal instead of Supreme Court, which has the jurisdiction to hear appeals from the High Court.

The issue before the Court is whether an application for leave to appeal on a case stated must be made to the High Court or to the Court of Appeal.

It is the contention of the plaintiffs that the application for leave to appeal to the Court of Appeal in this case is correctly made to the High Court.

Section 67(l) of the CJA states:

The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, **subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.** (Emphasis added).

By its provision s. 67 stipulates that it is the Court of Appeal which has the jurisdiction to hear appeals from the High Court. It does not however, state how or where leave is to be obtained for an appeal.

But the second limb of s. 22(3) of the AA stipulates a condition on an appeal on a case stated that leave must first be obtained either from the High Court or Supreme Court. This condition is not inconsistent with s. 67 of the CJA as this section itself expressly states that it is "... subject nevertheless to this or any other written law regulating the terms and conditions upon which such an appeal shall be brought." Therefore, the "any other written law" in this case is s. 22(3) of the AA which to my mind clearly sets out its own terms and conditions for bringing an appeal, that is, leave must first be obtained from either the High Court or the Supreme Court. There is no amendment in force that deletes or provides for the substitution of the High Court in s. 22(3), and that being the case, the provision that "... leave of the High Court ..." still remains in force unaltered. It is significant to note that there has been no amendment to date to change the "Supreme Court" ("Federal Court", by virtue of s. 46 of the Constitution (Amendment) Act 1994 (Act A885)) appearing in the second limb of s. 22(3) of the AA with the "Court of Appeal". Thus, to avoid confusion, an amendment should be made accordingly.

With regard to the defendants' contention that leave to appeal must in every case be made to the Court of Appeal as a result of the deletion of the words "or a Judge of the High Court" in s. 68 of the CJA, I with respect, do not agree. Section 68 sets out certain categories of non-appealable matters. Some of these categories provide that the matter is not appealable unless it is with the leave of the Court of Appeal. It is pertinent to note that the subject matter of the appeal in this case is on a case stated under sub-s. 1(a) of s. 22 of the AA. In the result, I hold that s. 68 of CJA is not relevant at all to an appeal on a case stated under the Arbitration Act.

Reference was also made by the defendants' Counsel to the unreported decision of Y.A. Dato' Abdul Kadir Musa JC, (as he then was) (not Y.A. Dato' Azmel as stated by the defendants' Counsel) in *TZ Engineering Sdn. Bhd. v. Metroplex Construction Co. Bhd.*, Kuala Lumpur High Court No: R2-24-2-96 where the learned Judicial Commissioner, on 10 June 1996 dismissed an application for leave to appeal made under s. 22(3) of the AA on the ground that as a result of the amendments to the CJA, the application ought to be made to the Court of Appeal and not to the High Court. Unfortunately, there was no written judgment by the learned Judicial Commissioner in this matter. Without the benefit of his learned written decision, I am with respect, unable to agree with his ruling in that regard.

In my judgment, the provisions regulating the terms and conditions upon which an appeal on a case stated under the AA must be construed in the context of that Act and not in that of the CJA and to that extent, the general provisions of the CJA must necessitate yield to the specific provisions of s. 22(3) of the AA, and thus, there is no conflict whatsoever between s. 22(3) of the AA and s. 68 of the CJA. *Generalibus specialia derogant* applies, that is where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (see *Public Prosecutor v. Chew Siew Luan* [1982] 2 MLJ 119; *Chan Tai & Anor. v. Official Assignee, F.M.* [1957] 23 MLJ 54; *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor.* [1995] 3 CLJ 520; *Commissioner of Income Tax v. Shahzada Nand & Sons* AIR [1966] SC 1342.

That being so, I hold that the application for leave to appeal to this Court is properly made, and for the reasons stated above, the defendants' preliminary objection is hereby overruled.

Reported by Alex KC Lee